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No. 82-95

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORDASILLA CORPORATION

Petitioner,

v.

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether damages may be recovered for the loss of use of a $750,000 ocean-going yacht which is used solely for pleasure when the yacht is detained for a period of fourteen months solely as a result of a shipyard's negligence.

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OPINIONS BELOW

The order of the Court of Appeals for the Fourth Circuit is included in the Appendix hereto, beginning at page 1a. The Judgment, and Opinion and Order of the District Court for the Eastern District of Virginia, Norfolk Division are included in the Appendix hereto, beginning at page 3a.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was rendered on April 16, 1982, and its order was entered on April 16, 1982.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

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STATEMENT OF THE CASE

The facts material to the consideration of the sole question on appeal were stated succinctly by the District Court in the findings of fact contained in its Opinion and Order. The Petitioner adopts the following findings of fact as a portion of its statement of the case.

> Plaintiff [Petitioner herein], a Panamanian corporation, was at all material times owner of the yacht ALLISA [*sic*]. The vessel is 120 feet long, 23 feet in

breadth and draws approximately eight feet, six inches. She has a steel hull, is equipped with twin diesel engines and is intended to be capable of ocean travel. The vessel was built in Scotland in 1963 and was purchased by the plaintiff corporation in France in November 1975 at a net cost of $675,000.00. At all material times the vessel was of Panamanian registry and at no time was it of American registry. (5a)[1]

Defendant corporation [Respondent herein] is a ship-builder and repairer with facilities in Norfolk, Virginia. (5a)

Subsequent to her purchase in France, the ALLISSA [*sic*] was brought across the Atlantic Ocean under her own power and arrived at the defendant's shipyard in Norfolk, Virginia on April 12, 1976. The vessel was left with defendant corporation for a number of repairs. . . . (5a-ba)

On approximately July 1, 1976 the vessel departed the defendant's Norfolk shipyard and cruised to Montreal, Quebec where it was a host vessel for 1976 Olympic activity, thereafter toured the Great Lakes and returned to defendant's ship repair facilities on November 12, 1976 for additional repair work . . . . (6a)

On February 3, 1977, while the vessel was in the sole care and custody of the defendant, a fire occurred on board which caused substantial damage to several state rooms, the galley and other areas . . . . Defendant acknowledged liability for the fire. Defendant undertook to correct the fire damage and restore the vessel . . . . (6a)

. . . .

. . . [P]laintiff lost the use of the vessel for approximately 14 months (from February 3, 1977 to April 5, 1978) as a direct result of the fire for which defendant acknowledges liability. (22a)

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[1] Page references are to the Appendix hereto.

. . . .

Plaintiff corporation has never been and apparently was never intended to be a profit-making company or a "business" in the ordinary sense of the word. It was formed by Julian Armstrong, Jr. and his wife Pauline S. Armstrong for the purpose of documenting and registering the foreign vessel. The Armstrongs are the principal shareholders of plaintiff. Mr. Armstrong is president and Mrs. Armstrong is vice-president of the plaintiff corporation. (7a)

At the time the vessel was purchased, it was the intention of the Armstrongs to cruise to the United States by way of the Carribean, to participate as host vessel owners in the 1976 Olympic Games at Montreal, Quebec, to tour the Great Lakes, to cruise down the east coast through the Panama Canal and up the west coast to Alaska, returning through the Carribean and to cruise thence to Europe for resale of vessel. It was never intended by the Armstrongs or the plaintiff to charter the vessel or to derive income from her in any way other than ultimate resale. (7a)

The Petitioner filed suit in the United States District Court for the Eastern District of Virginia, Norfolk Division, seeking to recover, among other things, for the loss of use of the vessel during the subject 14 month period. Jurisdiction was predicated upon 28 U. S. C. § 1333.

The District Court found that the Plaintiff suffered loss of use of the vessel in a factual and practical sense. (28a) However, the Court ruled that as a matter of law it was prohibited from awarding damages for loss of use. (28a)

The sole issue brought by the Plaintiff before the Fourth Circuit on appeal was in effect the same question now being presented to this Court herein. The Fourth Circuit affirmed the judgment of the District Court without a discussion of the applicable law. (2a)

REASONS FOR ALLOWING THE WRIT

THE DISTRICT COURT AND THE FOURTH CIRCUIT MISINTERPRETED *THE CONQUEROR* SINCE *THE CONQUEROR* DID NOT ESTABLISH AS A MATTER OF LAW THAT DAMAGES FOR LOSS OF USE OF A PLEASURE VESSEL ARE NOT RECOVERABLE

The Fourth Circuit affirmed the District Court's holding that as a matter of law it was compelled to deny the Petitioner damages in compensation for loss of use of the ALISSA. (2a) In rendering its decision, the District Court stated:

> It strikes one as *fundamentally unfair* that a yacht-owner can be deprived of the use of *an asset of substantial value* (in the range of $750,000.00 to $1,000,000.00 on the facts of this case) *for a substantial period solely as a result of another's negligence and yet be wholly denied money damages for such loss of use simply because the asset was a pleasure craft.* One wonders why the tortfeasor should benefit from the fact that an asset owner chose to forego commercial operations when *there is far less speculative nature or other question concerning ascertainable damages in these circumstances than there is concerning general damages in the run-of-the-mill personal injury case.* (Emphasis ours). (30a-31a)

> An aspect of this case which favors the plaintiff is the time factor involved. The cases cited by the defendant *did not involve the length of time presented by the facts in this case.* Also, while the arguments against speculative damages may have some merit, a rule of law which allows *no* damages for loss of use for a pleasure craft, no matter what its nature and no matter what the length of time, appears on the surface to be draconian. A treatise on the subject indicates a trend toward the policy of allowing recovery for loss of use. See D. Dobbs, *Remedies*, Sec. 5.11, Loss of Use Resulting from Injury or Destruction of Chattels (West Publishing Co., Hornbook Series). (Court's emphasis). (31a)

In spite of equities which would cause the undersigned to decide differently if this court were writing on a clean slate, the current state of the law compels a holding that plaintiff is not entitled to general damages to compensate for its loss of use of the vessel. Because of this conclusion of law, no attempt is made to determine conclusively what would have been a proper measure of damages or method of computing damages for loss of use.[10] (Emphasis ours). (31a)

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[10] If the law changed, or if the Fourth Circuit, on the facts of this case, should deem damages for loss of use awardable, an issue concerning the proper measure of such damages would arise. Plaintiff urges the net charter rate as a measure of damages. However, this measure would assume or require proof of a vessel in top operating condition and would require detailed proof of rates and expenses and likely charters to arrive at a fair net. Such a measure could be unfair to the extent it might result in application of a lucrative charter rate to a vessel which was never chartered, which could not legally be chartered and concerning which charter was not only never contemplated but was expressly declined.

A fairer measure of damages which would be considerably easier to apply (and which would result in far less distracting evidence over collateral detail) would consist of application of a fair average interest rate earnable during the loss-of-use period to the value of the vessel just preceding the event resulting in loss of use. An alternative rate could be that applicable to delinquent federal income tax payments during the loss of use period. Use of the state "legal" or judgment rate would cause undesirable variance in result depending on a location of the tortfeasor and such rates are generally below prevailing interest rates on investments. (31a-32a)

The foregoing notwithstanding, the District Court interpreted *The Conqueror,* 166 U. S. 110, 17 S. Ct. 510 (1897) [hereinafter cited as *The Conqueror*]; and *Thomson* v. *United States,* 266 F. 2d 852 (4th Cir. 1959) [hereinafter cited as

Thomson] as compelling a holding that damages for detention of a pleasure yacht are not recoverable as a matter of law. The Fourth Circuit affirmed.

The Petitioner respectfully submits that *The Conqueror* has been misinterpreted by the court below and previously by the Fourth Circuit Court of Appeals in *Thomson* and contends that *The Conqueror* never held or intended to hold that there can be no recovery as a matter of law for the loss of use of a pleasure yacht.

The CONQUEROR was a seagoing schooner rigged screw steamship 182½ feet long, about 25 feet wide and of 372 gross tons (i.e., her hull enclosed 37,200 cubic feet of space). Its owner, Frederick W. Vanderbilt, purchased the foreign built vessel in England for about $75,000 and brought the yacht to the United States in July of 1891.

The CONQUEROR cruised the east coast until August 27, 1891 when it was seized by the Collector of Customs on the ground that the yacht was a dutiable imported article.

Vanderbilt filed a liable against the Customs Collector seeking return of the yacht and damages for her wrongful detention.

In the district court Vanderbilt recovered the yacht and a total of $21,742.34 in damages. Of this amount, $15,000 was awarded for demurrage for detention of the yacht from August 27, 1891 to February 23, 1892, a period of five months and seven days.

The decree was affirmed in the Circuit Court of Appeals and the Customs Collector's successor petitioned for and was granted a writ of certiorari.

Two questions were involved in the merits of the case:

> First, whether this vessel was taxable under the tariff laws: second, *whether the award of damages was justified by the law and the testimony.* 17 S. Ct. at 511 (Emphasis ours).

After deciding the vessel was not dutiable and the Collector was liable for its wrongful arrest, the court stated:

> The main question in this case turns upon the proper measure of damages. In the amount of $21,742.24, awarded by the final decree of the district court, was included the sum of $15,000, "for loss of use of boat while detained by the respondent, from August 27, 1891, to February 3, 1892, at $100 per day." This is the principal item of damage to which objection is made in this court.
>
> That the loss of profits *or of the use of a vessel* pending repairs, or other detention, arising from a collision or other maritime tort, and commonly spoken of as "demurrage," is a proper element of damage, is too well settled both in England and America to be open to question. It is equally well settled, however, that demurrage will only be allowed when profits have actually been, or may be reasonably supposed to have been, lost, and the amount of such profits is proven with reasonable certainty. In one of the earliest English cases upon this subject (*The Clarence*, 3 W. Rob. Adm. 283), it was said by Dr. Lushington that "*in order to entitle a party to be indemnified for what is termed in this court a 'consequential loss,' being for the detention of his vessel, two things are absolutely necessary,—actual loss, and reasonable proof of the amount.* * * * It does not follow, as a matter of necessity, that anything is due for the detention of a vessel while under repair. Under some circumstances, undoubtedly, such a consequence will follow, as, for example, where a fishing voyage is lost, or where the vessel would have been beneficially employed." (Emphasis ours).

17 S. Ct. at 516.

The Petitioner submits that the Court never intended to hold that only loss of profits from a vessel in commercial use could ever be recovered. If that were so, the court would not have inserted the words "of the use of a vessel" preceded by the conjunction "or" after the words "That the loss of profits." In its most common usage, the conjunction "or" is a function word utilized to indicate an alternative.

Furthermore, the Petitioner submits that the Supreme Court denied damages for loss of use in *The Conqueror* primarily because the Plaintiff failed to adequately prove the amount of damages he sustained as a result of his loss of use of the vessel, rather than because the CONQUEROR was a pleasure vessel. This submission is based upon two excerpts from the opinion in *The Conqueror,* which are as follows:

> [W]e are bound to say that their [Vanderbilt's experts] testimony falls far short of establishing such a case of loss of profits as entitles the libelant to recover this large sum for the detention of his yacht . . . .
>
> and
>
> We think the testimony upon the subject of demurrage in this case should have been held to be insufficient.

17 S. Ct., at 519.

The Conqueror was interpreted in this manner by Judge Learned Hand in *The Vanadis,* 250 F. 1010 (S. D. N. Y. 1918) [hereinafter cited as *The Vanadis*]. In that case, the yacht VANADIS was damaged by collision. The commissioner ruled that the owner was not entitled to detention for the months she lost and the exception taken was allowed. The court's interpretation of *The Conqueror* was articulated thusly:

> On principle it seems to me impossible that we should draw any distinction between yachts and any other property capable of use only as means of recreation or pleasure. Nobody has any hesitation about such as are consumable, like wines, or flowers, or perfumes, or tobacco. It would be a fatuous defense against an action for injuries to such as these to prove that the owner would certainly have consumed them himself. Furthermore, if the defendant had wrongfully destroyed a yacht or motorcar, he would be hardier than most, were he to offer to show that the owner was bound not to sell or to let it. Yet surely there can be no distinction, at least it would seem so, between the loss of a part of the recreation derivable from such property and the loss of the whole. All of them in the end are consumable, and the difference is only in the extent of loss.

> But it is urged that the contrary is established in The Conqueror, ... *I must concede that some of the language in that case, broken from its context, lends itself to that conclusion, but the decision involved nothing of the kind. It turned upon the dubiousness of the proof of value of the yacht. Doubtless that is a necessary condition of damages here as elsewhere . . . . I see no reason to think that, if the exchange value of the yacht's use in The Conqueror, supra, had been established in the customary way, the libelant would have had further difficulty in his recovery.* (Emphasis ours).

250 F. at 1010-1011.

The Supreme Court had occasion to address *The Conqueror* decision in *Brooklyn Eastern District Terminal* v. *United States*, 287 U. S. 170, 53 S. Ct. 103 (1932) [hereinafter cited as *Brooklyn*]. The *Brooklyn* litigation resulted from a collision between the government's dredge RARITAN and the terminal's tug INTEGRITY. The trial court held both vessels at fault and decreed the damages should be divided equally under the rule then prevailing. When the case reached the Supreme Court, the single point of demurrage remained in controversy. The district court allowed the terminal $11,700 loss of use for the INTEGRITY computed at $150 per day for 78 days, the market hire of another tug, though no substitute tug was hired. The Court of Apeals excluded this item (54 F. 2d 978) and certiorari was granted.

The terminal normally used three tugs to shuttle railcar floats about the harbor. While the INTEGRITY was undergoing repairs, it made do with its remaining two tugs, working them overtime as necessary. No evidence was offered as to the extra expense incurred. No evidence was adduced from which the court could predicate an award upon interest computed on the capital value of the tug. The Court denied the terminal recovery for demurrage on the rationale that:

> So here. The petitioner was engaged in an established business using tugs for a single purpose. It had no thought to turn that business into one of a different kind while this

> tug was out of service. Mindful of the need to minimize the damages, it used to the full its available resources, and was able by special effort to make them do the work. We are unable to accept the argument that the expenses which it saved are to be charged to the respondent as if they had not been saved at all.

287 U. S. 170, 177; 53 S. Ct. 103, 105.

However, in reaching its decision, the following discussion ensued:

> *The vessel may be a yacht, employed for pleasure and not for business. Even then, in the judgment of many courts, the value of the use may be considered by the triers of the facts in fixing the recovery if there has been a substantial impairment of that enjoyment for which such vessels are maintained.* The Lagonda, supra; Cook v. Packard Motor Car Co., supra; Banta v. Stamford Motor Co., 89 Conn. 51, 56, 92 A. 665; Perkins v. Brown, supra; Hunt Co. v. Boston Elevated R. Co., 199 Mass. 220, 235, 236, 85 N.E. 446; The Astrakhan, (1910) P. 172, 181. *There are statements in The Conqueror* (page 133 of 166 U.S., 17 S.Ct. 519) *that may be in conflict with that view, but they were not essential to the judgment* (page 134 of 166 U.S., 17 S.Ct. 519), *and in the light of later decisions as to the loss of pleasure vehicles are unquestionably in opposition to a strong current of authority.* See cases, supra. The owner of the Conqueror would not have let his yacht to any one if there had been no occasion to repair her, nor during the season that she was out of service would he have used her for himself. The Conqueror, 166 U.S. at page 134, 17 S. Ct. 510, 41 L.Ed. 937. There was *neither* interference with profit *nor substantial disturbance of enjoyment. The court did not hold that even then there could be no recovery whatever.* Cf. Cook v. Packard Motor Car Co., supra, at page 596 of 88 Conn., 92 A. 413. *It held that recovery was excessive when based on the returns of an imaginary letting.* . . . (Emphasis ours)

287 U. S., at 175; 53 S. Ct., at 104-105

The case which the District Court considered to be dispositive is *Thomson*. The District Court in the instant case, and the Fourth Circuit in *Thomson* and the instant case, interpreted *The Conqueror* as holding that there can be no recovery for loss of use of a pleasure vessel as a matter of law.

Thomson arose as a result of a collision between the 55 foot diesel yacht MOBY DICK and the wreck of the gunnery target ship SAN MARCOS. The district court held both parties at fault and divided damages equally under the rule then prevailing. The yachtowner appealed and the government cross-appealed. The Fourth Circuit affirmed. We infer that the MOBY DICK was detained for 99 days following the collision on April 22, 1957, since her owner was awarded his captain's salary, maintenance and expense for that period. 266 F. 2d, at 856. In discussing the yachtowner's claim for loss of use, the Fourth Circuit cited *The Conqueror* for the proposition that:

> Demurrage is not allowable damage in a case of this sort, for valuation of the loss of use of pleasure craft is highly speculative and immeasurable. The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 41 L. Ed. 927 .... (Emphasis ours).

266 F. 2d, at 856.

The Petitioner submits that the Fourth Circuit misinterpreted *The Conqueror* since the Supreme Court did not utter either expressly or impliedly any rule that no recovery may ever be had for loss of use of a pleasure craft because its valuation is highly speculative and immeasurable.

Two eminent jurists, Justice Cordozo, in *Brooklyn*, and Judge Learned Hand, in *The Vanadis*, have understood *The Conqueror* as *not* holding that recovery cannot be had under any circumstances for loss of use of a pleasure yacht. The Petitioner submits that this is the proper interpretation and that *The Conqueror* was accordingly misinterpreted by the Fourth Circuit.

THE DECISIONS OF THE FOURTH CIRCUIT IN *THOMSON* v. *UNITED STATES* AND THE CASE AT BAR ARE IN CONFLICT WITH DECISIONS OF THE SUPREME COURT, THE SECOND CIRCUIT, CERTAIN DISTRICT COURTS AND CERTAIN STATE COURTS OF LAST RESORT ON THE SAME MATTER.

As discussed above, the Supreme Court in *Brooklyn* stated that the Court in *The Conqueror* did not hold that there could be no recovery for loss of use of a pleasure vessel.

In *The Vanadis*, also discussed above, the court cited *The Eros*, 251 F. 45 (2d Cir. 1918), for the proposition that "the charterer of a yacht is entitled to damages for withdrawal [of the yacht from charter] by the owner during the season". The Southern District of New York then proceeded to allow damages for the detention of the yacht involved in *The Vanadis*.

As early as 1890, the Eastern District of New York granted damages for loss of use of a yacht. In *The Lagonda*, 44 F. 367 (E. D. N. Y. 1890), noted by the Supreme Court in *The Conqueror* to be one of the yacht cases for which demurrage had been awarded, the yacht was idle for eight days by collision. It cost $36,000 and the commissioner, to whom the case had been referred, allowed interest on the purchase price for eight days for a total of $48. Owners took exception claiming entitlement to the charter rates. The district court allowed the exception and awarded the equivalent of eight days charter hire stating, *inter alia*, the following:

> It appeared before the commissioner that the Lagonda was a pleasure boat, kept for the personal use of the owner, and without any intention to use her for profit; .... No evidence was introduced to show that the owner desired or

> sought a substitute for the yacht during that period. . . . It cannot be doubted that demurrage is recoverable for the detention of a yacht caused by a wrongful act.

44 F., at 368.

Likewise, damages for loss of use of a pleasure yacht were allowed by the Southern District of Florida in *Finkel* v. *Challenger Marine Corp.*, 316 F. Supp. 549 (S. D. Fla. 1970), and the Eastern District of North Carolina in *Yachts, Inc.* v. *The Edward F. Farrington,* 146 F. Supp. 754 (E. D. N. C. 1956).

The Western District of Pennsylvania awarded detention damages predicated upon the value of the vessel, the length of the detention and the legal interest rate in *English Whipple Sailyard* v. *Yawl Ardent,* 459 F. Supp. 866 (W. D. Pa. 1978).

Under analogous circumstances, state courts of last resort have allowed damages for loss of use of automobiles used for pleasure purposes. See *Cook* v. *Packard Motor Car Co. of New York,* 88 Conn. 590, 92 A. 413 (1914); *Holmes* v. *Raffo,* 374 P. 2d 536 (S. Ct. Wash. 1962); *Stephens* v. *Foster,* 51 P. 2d 248 (S. Ct. Ariz. 1935); *Perkins* v. *Brown,* 177 S. W. 1158 (S. Ct. Tenn. 1915).

The Petitioner submits that the decisions of the Fourth Circuit in *Thomson* and the case at bar are in conflict with the above cited decisions of the Supreme Court, the Second Circuit, certain District Courts and certain state courts of last resort on the same matter.

CONCLUSION

It is respectfully submitted that *The Conqueror* has been misinterpreted by the courts below, resulting in an interpretation at variance with an interpretation previously made by this Court and interpretations made by other Courts of Appeal and various District Courts. This has bred confusion in the law which the Petitioner submits should be settled by this Court, by allowing this Petition.

Respectfully submitted,

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